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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 TINA D.,

10 Plaintiff,

Case No. C19-5057JLR

11 v.

ORDER AFFIRMING DENIAL OF
BENEFITS

12 COMMISSIONER OF SOCIAL
SECURITY,

13 Defendant.

14 **I. INTRODUCTION**

15 Plaintiff Tina D. seeks review of the denial of her application for disability
16 insurance benefits. (*See* Compl. (Dkt. # 4).) Plaintiff contends that the administrative
17 law judge (“ALJ”) erred in (1) applying the law of the case doctrine, (2) evaluating the
18 medical evidence in the record, (3) finding at step two that Plaintiff did not have a severe
19 impairment of fibromyalgia, (4) evaluating Plaintiff’s symptom testimony, (5) evaluating
20 the lay witness statements in the record, and (6) assessing Plaintiff’s residual functional
21 capacity (“RFC”). (Pl. Op. Br. (Dkt. # 12) at 2.) As discussed below, the court
22 **AFFIRMS** the final decision of the Commissioner of Social Security (“Commissioner”)
23 and **DISMISSES** this case with prejudice.

II. BACKGROUND

A. Procedural History

This is the second time this case is before the court. Plaintiff filed an application for disability benefits on October 4, 2012, alleging that her disability began on January 9, 2010. (*See* Admin. Record (“AR”) (Dkt. # 8) at 81, 161-67.) Plaintiff alleged that her disability began when she was in a car accident. (*Id.* at 42.) Plaintiff’s claims were denied on initial review and on reconsideration. (*Id.* at 80-102.) On January 8, 2013, Plaintiff was in a second car accident, which she alleged worsened her symptoms. (*See id.* at 45.)

On May 1, 2014, ALJ Ruperta Alexis conducted a hearing on Plaintiff’s claims. (*Id.* at 36-79.) On August 26, 2014, ALJ Alexis issued a decision denying Plaintiff benefits. (*Id.* at 15-30.) The Appeals Council denied review. (*Id.* at 1-3.)

On October 11, 2016, Chief U.S. Magistrate Judge Brian Tsuchida issued a decision reversing ALJ Alexis’s decision and remanding the matter for further proceedings. (*Id.* at 782-803.) Judge Tsuchida held that ALJ Alexis did not err in discounting Plaintiff’s symptom testimony; in finding that Plaintiff did not have severe impairments of thoracic outlet syndrome and fibromyalgia; in rejecting the opinions of Charles May, M.D., Marla Kaufman, M.D.; in accepting the opinions of William Chalstrom, Ph.D.; and in rejecting the lay witness statements of Cheryl Moore and Melinda Gauyan. (*Id.* at 783-802.) Judge Tsuchida held that ALJ Alexis did err, however, in finding that Plaintiff’s migraine headaches were not a severe impairment; in

1 evaluating the opinions of Nancy Henry-Socha, M.D.; and in rejecting the lay witness
2 statements of Ben D.¹ (*Id.*) Judge Tsuchida ordered that, on remand, the ALJ “shall
3 reevaluate [Plaintiff’s] headaches at step two; Dr. Henry-Socha’s medical opinion; the lay
4 witness statement from Ben [D.]; and, as necessary, [Plaintiff’s] RFC and the remaining
5 steps of the five-step evaluation process.” (*Id.* at 803.)

6 On remand, ALJ Larry Kennedy conducted a hearing at which Plaintiff and a
7 vocational expert testified. (*Id.* at 689-751.) On September 24, 2018, ALJ Kennedy
8 issued a decision again denying Plaintiff disability benefits. (*Id.* at 658-76.) ALJ
9 Kennedy noted that he had been directed on remand to reevaluate Plaintiff’s migraine
10 headache symptoms, Dr. Henry-Socha’s opinions, and Plaintiff’s husband’s statements.
11 (*Id.* at 659.) ALJ Kennedy further noted, however, that Judge Tsuchida had not assigned
12 error to any other portion of ALJ Alexis’s decision. (*Id.*) ALJ Kennedy therefore
13 adopted and incorporated by reference ALJ Alexis’s step two findings other than her
14 findings on migraine headaches, rejection of Plaintiff’s symptom testimony, rejection of
15 the opinions of Dr. May and Dr. Kaufman, treatment of Dr. Chalstrom’s opinion, and
16 rejection of Ms. Moore’s and Ms. Gauyan’s statements. (*Id.*)

18 **B. The ALJ’s Decision**

19 Utilizing the five-step disability evaluation process, 20 C.F.R. § 404.1520, ALJ
20 Kennedy found:

21 **Step one:** Plaintiff did not engage in substantial gainful activity during the period
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23 ¹ Mr. D. was Plaintiff’s husband. (*Id.* at 250.) His last name has therefore been redacted,
as it is the same as Plaintiff’s.

1 from her alleged onset date of January 9, 2010, through her date last insured of
2 September 30, 2015. *See* 20 C.F.R. §§ 404.1571-76.

3 **Step two:** Through the date last insured, Plaintiff had the following severe
4 impairments: Cervical spine degenerative disk disease, depressive disorders
(including bipolar disorder) and migraine headaches. *See* 20 C.F.R.
5 § 404.1520(c).

6 **Step three:** Through the date last insured, Plaintiff did not have an impairment or
7 combination of impairments that met or medically equaled the severity of one of
the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. *See* 20
8 C.F.R. §§ 404.1520(d), 404.1525, 404.1526.

9 **RFC:** Through the date last insured, Plaintiff could perform sedentary work as
10 defined in 20 C.F.R. § 404.1567(a), with exceptions. Plaintiff was limited to
simple and repetitive work activity. She could interact appropriately with the
11 public and coworkers, and could focus and concentrate on simple, repetitive,
12 routine activity.

13 **Step four:** Through the date last insured, Plaintiff was unable to perform any past
14 relevant work. *See* 20 C.F.R. § 404.1565.

15 **Step five:** Through the date last insured, considering Plaintiff's age, education,
16 work experience, and RFC, there were jobs that existed in significant numbers in
17 the national economy that she could have performed. *See* 20 C.F.R. §§ 404.1569,
18 404.1569(a).

19 (AR at 658-76.) Based on these findings, ALJ Kennedy found that Plaintiff had not been
20 under a disability, as defined in the Social Security Act, from the alleged onset date of
21 January 9, 2010, through the date last insured of September 30, 2015. (*Id.* at 676.)

22 Plaintiff did not file written exceptions and the Appeals Council did not assume
23 jurisdiction of the case. (*See generally id.*) ALJ Kennedy's decision thus became the
Commissioner's final decision. *See* 20 C.F.R. § 404.984(d). This appeal followed.

24 III. DISCUSSION

25 Plaintiff bears the burden of proving she is disabled within the meaning of the

1 Social Security Act. *See Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Pursuant
2 to 42 U.S.C. § 405(g), the court may only set aside a denial of social security benefits
3 when the ALJ’s findings are based on legal error or not supported by substantial evidence
4 in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005).
5 The ALJ is responsible for determining credibility, resolving conflicts in medical
6 testimony, and resolving any other ambiguities that exist. *Andrews v. Shalala*, 53 F.3d
7 1035, 1039 (9th Cir. 1995). While the court is required to examine the entire record, it
8 may neither reweigh the evidence nor substitute its judgment for that of the ALJ. *See*
9 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

11 **A. The ALJ Did Not Err in Applying the Law of the Case Doctrine**

12 Plaintiff argues that ALJ Kennedy misapplied the law of the case doctrine. (Pl.
13 Op. Br. at 2-4.) “Under the law of the case doctrine, ‘a court is generally precluded from
14 reconsidering an issue that has already been decided by the same court, or a higher court
15 in the identical case.’” *Buck v. Berryhill*, 869 F.3d 1040, 1050 (9th Cir. 2017) (quoting
16 *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)). “The doctrine is concerned
17 primarily with efficiency, and should not be applied when the evidence on remand is
18 substantially different, when the controlling law has changed, or when applying the
19 doctrine would be unjust.” *Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016) (citing
20 *Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991)).

21
22 Plaintiff fails to articulate with any specificity what evidence ALJ Kennedy
23 misapplied the doctrine to. Instead, Plaintiff appears to argue that ALJ Kennedy was

1 required to reevaluate all of the evidence, including the evidence for which Judge
2 Tsuchida affirmed ALJ Alexis's analysis, because Plaintiff submitted new evidence.
3 However, new evidence in the record does not automatically mean ALJ Kennedy had to
4 reevaluate all of ALJ Alexis's findings. Plaintiff did not explain how the new evidence
5 undermined ALJ Alexis's findings that were affirmed. "Our adversarial system relies on
6 the advocates to inform the discussion and raise the issues to the court. . . . However
7 much we may importune lawyers to be brief and to get to the point, we have never
8 suggested that they skip the substance of their argument in order to do so." *Indep.*
9 *Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003). The court will address
10 application of the law of the case to the specific pieces of evidence for which Plaintiff has
11 alleged error as necessary, but Plaintiff has not shown that, as a general proposition, ALJ
12 Kennedy erred in applying the law of the case doctrine to the issues on which Judge
13 Tsuchida affirmed ALJ Alexis. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d
14 1155, 1161 n.2 (9th Cir. 2008) (declining to address an issue because the appellant failed
15 to argue it with any specificity in his briefing).
16

17 **B. The ALJ Did Not Err in Evaluating the Medical Evidence**

18 Plaintiff argues that ALJ Kennedy erred in evaluating the medical evidence and
19 opinions in the record. (Pl. Op. Br. at 4-8.) Plaintiff argues that ALJ Kennedy erred in
20 evaluating new evidence submitted on remand, erred in rejecting the opinions of Dr.
21 Henry-Socha, erred in rejecting the opinions of treating providers Stefan Tolles, M.D.,
22 and Margaret Griffel, ARNP, and erred in accepting the opinions of three non-examining
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1 physicians. (*Id.*) The court will address each argument in turn.

2 1. The ALJ Did Not Err in Evaluating the New Evidence

3 Plaintiff argues that ALJ Kennedy failed to consider new evidence submitted on
4 remand. (Pl. Op. Br. at 4-5.) This argument has no merit. ALJ Kennedy cited to and
5 discussed the new evidence submitted on remand throughout his opinion. (*See* AR at
6 662-63, 665, 668-74.) ALJ Kennedy was not required to discuss every treatment note in
7 the record, as Plaintiff suggests. Plaintiff argues for a different interpretation of the
8 evidence, but she has not shown that ALJ Kennedy's interpretation of the evidence was
9 irrational, and thus has not shown error. *See Thomas*, 278 F.3d at 954.

10 2. The ALJ Did Not Err in Evaluating Dr. Henry-Socha's Statements

11 Plaintiff argues that ALJ Kennedy erroneously rejected Dr. Henry-Socha's
12 statements. (Pl. Op. Br. at 6.) Dr. Henry-Socha evaluated Plaintiff on April 29, 2014, as
13 part of a pain management consultation. (AR at 629-34.) Dr. Henry-Socha took a
14 medical history from Plaintiff and performed a physical examination. (*Id.* at 629-32.)
15 Dr. Henry-Socha opined that Plaintiff's "pain etiology appears to be multifactorial
16 including fibromyalgia syndrome, myofascial pain, impaired sleep, [and] psychosocial
17 stressors such as anxiety, depression, and possible posttraumatic stress disorder from her
18 motor vehicle accident." (*Id.* at 632.) Dr. Henry-Socha further noted that Plaintiff had "a
19 history of migraine headaches, which could be connected to her history of myofascial
20 pain as well." (*Id.*)

21 In the first administrative decision, ALJ Alexis rejected Dr. Henry-Socha's
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1 statements because Dr. Henry-Socha did not describe reviewing any records and
2 appeared to rely heavily on Plaintiff's self-reports. (*Id.* at 27.) Judge Tsuchida found
3 error because Dr. Henry-Socha's evaluation was based at least in part on a physical
4 examination, and ALJ Alexis had not provided any basis to support the conclusion that
5 Dr. Henry-Socha disregarded her own observations in favor of Plaintiff's self-reports.
6 (*Id.* at 796-97.)

7
8 On remand, ALJ Kennedy reevaluated Dr. Henry-Socha's statements and again
9 rejected them. (*Id.* at 671-72.) ALJ Kennedy reasoned that Dr. Henry-Socha's
10 statements "d[id] not contain a medical opinion *per se*" because they did not contain any
11 statements about vocational restrictions. (*Id.* at 671.) ALJ Kennedy further rejected Dr.
12 Henry-Socha's statements because they used equivocal language that "indicate[d] that the
13 doctor was unsure of a diagnosis regarding [Plaintiff's] pain complaints." (*Id.* at 672.)
14 Finally, ALJ Kennedy rejected Dr. Henry-Socha's statements because they related to
15 conditions that were found not to be medically determinable impairments, a
16 determination Judge Tsuchida previously affirmed. (*See id.* at 672, 790-93, 795.)

17 Plaintiff has failed to show that ALJ Kennedy harmfully erred. *See Ludwig v.*
18 *Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) (citing *Shinseki v. Sanders*, 556 U.S. 396,
19 407-09 (2009)) (holding that the party challenging an administrative decision bears the
20 burden of proving harmful error). ALJ Kennedy was correct that Dr. Henry-Socha's
21 statements did not include any functional or vocational restrictions. (*See AR* at 629-34.)
22 There was therefore nothing for ALJ Kennedy to accept or reject in terms of Plaintiff's
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1 RFC. *See Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1223 (9th Cir. 2010).

2 Moreover, to the extent Plaintiff argues that Dr. Henry-Socha’s findings support
3 Plaintiff’s testimony, that is only relevant to whether ALJ Kennedy correctly analyzed
4 Plaintiff’s testimony (which is discussed below), not to whether ALJ Kennedy correctly
5 analyzed Dr. Henry-Socha’s statements. It is also a request for a different interpretation
6 of the evidence rather than a showing that ALJ Kennedy’s interpretation was irrational.
7 As such, Plaintiff has failed to show harmful error. *See Thomas*, 278 F.3d at 954.

8
9 3. The ALJ Did Not Err in Rejecting Dr. Tolles and Ms. Griffel’s Opinions

10 Plaintiff argues that ALJ Kennedy erred in rejecting the opinions of treating
11 providers Dr. Tolles and Ms. Griffel. (Pl. Op. Br. at 6-7.) The record contains two
12 statements from Ms. Griffel, one of which was cosigned by Dr. Tolles. (*See* AR at
13 1603-08.) ALJ Kennedy addressed the statements separately, and the court will do the
14 same. (*See id.* at 674.)

15 In a letter dated March 14, 2018, Dr. Tolles and Ms. Griffel reported that Plaintiff
16 had been diagnosed with a number of conditions, and opined that “[t]hese diagnoses may
17 interfere with [Plaintiff’s] ability to work at times due to increased symptoms.” (*Id.* at
18 1603.) ALJ Kennedy gave the opinions in this letter “no weight.” He reasoned that the
19 letter “d[id] not contain any specific vocational limitations, and d[id] not indicate whether
20 it pertain[ed] to the period prior to the [sic] September 2015.” (*Id.* at 674.) ALJ Kennedy
21 further noted that many of the diagnoses listed in the letter had been found not to be
22 medically determinable impairments. (*Id.*) And, to the extent the statement that the
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1 diagnoses “may interfere” with Plaintiff’s ability to work could be considered a
2 vocational limitation, ALJ Kennedy found that it was too ambiguous to be useful. (*Id.*)

3 As an initial matter, ALJ Kennedy failed to note that Dr. Tolles cosigned this
4 statement, and instead described it as solely containing the opinions of Ms. Griffel. (*See*
5 AR at 674.) This error was not a harmful in and of itself, but it does raise the bar ALJ
6 Kennedy had to clear to support rejecting the opinions. An ALJ need only provide
7 germane reasons to reject the opinions of a nurse practitioner. *Dale v. Astrue*, 823 F.3d
8 941, 943 (9th Cir. 2016) (citing *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012)).
9 But an ALJ may only reject the opinions of a treating doctor when contradicted if the
10 ALJ provides “specific and legitimate reasons that are supported by substantial evidence
11 in the record for so doing.” *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (citing
12 *Andrews*, 53 F.3d at 1042). ALJ Kennedy’s reasons for rejecting the opinions of Dr.
13 Tolles and Ms. Griffel contained in the March 2018 letter must therefore be specific and
14 legitimate, as opposed to merely germane.
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16 Plaintiff has again failed to show that ALJ Kennedy harmfully erred. *See Ludwig*,
17 681 F.3d at 1054 (citing *Shinseki*, 556 U.S. at 407-09). ALJ Kennedy reasonably
18 discounted the opinions in the March 2018 letter because there was no statement that they
19 related to the alleged disability period of January 9, 2010, to September 30, 2015, which
20 limited the statement’s usefulness. *See Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393,
21 1395 (9th Cir. 1984). ALJ Kennedy further reasonably discounted the opinions in the
22 March 2018 letter because they were too ambiguous to be useful. *See King v. Comm’r of*
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1 *Soc. Sec. Admin.*, 475 F. App'x 209, 210 (9th Cir. 2012).

2 Ms. Griffel also completed a physical medical source statement, dated April 11,
3 2018.² (AR at 1604-08.) Ms. Griffel opined that Plaintiff had functional limitations in
4 sitting, standing, walking, lifting, carrying, twisting, stooping, crouching, climbing
5 ladders, climbing stairs, moving her head, reaching, handling, and fingering. (*Id.*) Ms.
6 Griffel originally wrote that the earliest date that these limitations applied was January
7 21, 2018, but someone crossed the year out and changed it to 2013. (*See id.* at 1607.)
8

9 ALJ Kennedy gave Ms. Griffel's April 2018 opinions little weight. (*Id.* at 674.)
10 Because the April 2018 statement was not signed by Dr. Tolles, ALJ Kennedy only
11 needed to provide germane reasons for rejecting the opinions in it. *See Dale*, 823 F.3d at
12 943 (citing *Molina*, 674 F.3d at 1111). ALJ Kennedy first reasoned that the record did
13 not indicate who changed the year Plaintiff's symptoms began from 2018 to 2013. (AR
14 at 674.) This was not a legitimate reason to reject Ms. Griffel's April 2018 opinions.
15 The year change looks to be in the same handwriting as the rest of the document, and if
16 ALJ Kennedy believed the record was ambiguous, he should have contacted Ms. Griffel
17 to clarify whether she changed the form.

18 ALJ Kennedy further reasoned that the severity of limitations to which Ms. Griffel
19 opined were unsupported by and inconsistent with her treatment notes. (*Id.*) Plaintiff has
20 failed to show harmful error. *See Ludwig*, 681 F.3d at 1054 (citing *Shinseki*, 556 U.S. at
21 407-09). ALJ Kennedy noted that Ms. Griffel's treatment notes showed few to no issues
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23 ² This statement contains a signature line for Dr. Tolles, but no signature. (*Id.* at 1608.)

1 with gait abnormality, weakness, sensation deficits, or other abnormalities in the upper or
2 lower extremities. (AR at 674, 1064, 1067-68, 1198, 1202, 1206, 1209, 1217, 1223,
3 1227-28, 1236, 1240, 1244-45, 1249, 1258, 1262.) ALJ Kennedy further noted that
4 Plaintiff regularly denied many of the symptoms Ms. Griffel indicated as rationale for her
5 opined limitations. (*Id.* at 674, 1175-76, 1186, 1194, 1202, 1206, 1209, 1217, 1223,
6 1227-28, 1236, 1240, 1244-45, 1249, 1258, 1262.) Although these records are not as
7 unanimously contrary to Ms. Griffel's opinions as ALJ Kennedy suggested, Plaintiff has
8 not shown that ALJ Kennedy unreasonably interpreted them. Therefore, Plaintiff has
9 failed to show that ALJ Kennedy harmfully erred in rejecting Ms. Griffel's April 2018
10 opinions.
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12 4. The ALJ Did Not Err in Accepting the Non-Examining Doctors' Opinions

13 Plaintiff argues that ALJ Kennedy erred in giving the "most weight" to the
14 opinions of three non-examining doctors. (Pl. Op. Br. at 8.) Plaintiff makes no specific
15 argument, stating only that ALJ Kennedy should have given more weight to the opinions
16 in the record from the treating and examining physicians. (*See id.*) Plaintiff has failed to
17 show that ALJ Kennedy erred in weighing the opinions of the treating and examining
18 doctors, so Plaintiff has failed to show that ALJ Kennedy erred in giving the most weight
19 to the opinions of the non-examining doctors.
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21 **C. The ALJ Did Not Err at Step Two in Finding That Fibromyalgia Was Not a Severe Impairment**

22 Plaintiff argues that ALJ Kennedy erred at step two of the disability evaluation
23 process by finding that Plaintiff did not have a severe impairment of fibromyalgia. (Pl.

1 Op. Br. at 7-8.) Plaintiff's argument is the same as the argument she made before Judge
2 Tsuchida. (*See* AR at 795.) Although additional evidence was submitted, the outcome
3 remains the same. Plaintiff has failed to show harmful error.

4 ALJ Kennedy found that Plaintiff's alleged fibromyalgia was not a severe
5 impairment. (*Id.* at 662.) ALJ Kennedy, following the same reasoning as ALJ Alexis,
6 found that fibromyalgia was not a medically determinable impairment because "the
7 record does not reflect the diagnostic criteria required in the regulations, including the
8 requirement to rule out other possible conditions prior to diagnosing fibromyalgia." (*Id.*)
9 Only medically determinable impairments can be considered severe impairments at step
10 two of the disability evaluation process. *See* 20 C.F.R. § 404.1520(c). Fibromyalgia was
11 thus not a severe impairment at step two.

13 Plaintiff points to diagnoses of fibromyalgia, but fails to address the problem ALJ
14 Kennedy noted: The absence of evidence that Plaintiff's providers ruled out other
15 possible conditions prior to diagnosing fibromyalgia. (*See* AR at 662.) Under Social
16 Security Ruling ("SSR") 12-2p, 2012 WL 3104869 (July 25, 2013), fibromyalgia can
17 only be deemed a medically determinable impairment if there is "[e]vidence that other
18 disorders that could cause the symptoms or signs were excluded." *Id.* at *3. "Other
19 physical and mental disorders may have symptoms or signs that are the same or similar to
20 those resulting from [fibromyalgia]. Therefore, it is common in cases involving
21 [fibromyalgia] to find evidence of examinations and testing that rule out other disorders
22 that could account for the person's symptoms and signs." *Id.* All Plaintiff has done is
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1 argue that her providers diagnosed her with fibromyalgia. (*See* Pl. Op. Br. at 7-8; Pl.
2 Reply Br. (Dkt. # 14) at 6-7.) She has not pointed to any evidence showing that these
3 providers ruled out other disorders that could cause her symptoms. Plaintiff has
4 consequently failed to show that ALJ Kennedy harmfully erred at step two in finding that
5 fibromyalgia was not a severe impairment.

6 **D. The ALJ Did Not Harmfully Err in Discounting Plaintiff’s Testimony**

7 Plaintiff argues that ALJ Kennedy erred in discounting Plaintiff’s symptom
8 testimony. (Pl. Op. Br. at 8-15.) Judge Tsuchida affirmed ALJ Alexis’s decision to
9 discount Plaintiff’s symptom testimony from the first hearing and her written statement in
10 the record at that time. (AR at 783-88.) Plaintiff testified again at the second hearing,
11 and ALJ Kennedy analyzed that testimony as part of his decision. (*See id.* at 667-71,
12 689-751.)

14 The Ninth Circuit has “established a two-step analysis for determining the extent
15 to which a claimant’s symptom testimony must be credited.” *Trevizo v. Berryhill*, 871
16 F.3d 664, 678 (9th Cir. 2017). The ALJ must first determine whether the claimant has
17 presented objective medical evidence of an impairment that “‘could reasonably be
18 expected to produce the pain or other symptoms alleged.’” *Id.* (quoting *Garrison v.*
19 *Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014)). At this stage, the claimant need only
20 show that the impairment could reasonably have caused some degree of the symptoms;
21 she does not have to show that the impairment could reasonably be expected to cause the
22 severity of the symptoms alleged. *Id.* ALJ Kennedy found that Plaintiff met this first
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1 step. (AR at 667.)

2 If the claimant satisfies the first step, and there is no evidence of malingering, the
3 ALJ may only reject the claimant's testimony "by offering specific, clear and convincing
4 reasons for doing so. This is not an easy requirement to meet." *Trevizo*, 871 F.3d at 678
5 (quoting *Garrison*, 759 F.3d at 1014-15). In evaluating the ALJ's determination at this
6 step, the court may not substitute its judgment for that of the ALJ. *Fair v. Bowen*, 885
7 F.2d 597, 604 (9th Cir. 1989). As long as the ALJ's decision is supported by substantial
8 evidence, it should stand, even if some of the ALJ's reasons for discrediting a claimant's
9 testimony fail. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

11 ALJ Kennedy found Plaintiff's symptom testimony "not entirely consistent with"
12 the medical record and Plaintiff's activities. (AR at 667-71.) ALJ Kennedy separately
13 analyzed Plaintiff's allegations regarding her migraine headaches, her general pain, and
14 her mental health. (*Id.*) The court will do the same.

15 1. The ALJ Did Not Harmfully Err in Discounting Plaintiff's Testimony
16 Regarding the Severity of Her Headache Symptoms

17 Plaintiff testified that she suffered from migraine headaches every day, which
18 caused blurred vision and intense pain. (*Id.* at 43, 51, 55, 61-62, 715, 721.) Plaintiff
19 testified that she was in a third car accident in March 2015 that caused her migraines to
20 worsen. (*Id.* at 711, 720.)

21 ALJ Kennedy discounted Plaintiff's migraine testimony because he found that the
22 medical record was not consistent with the severity of symptoms Plaintiff alleged. (*Id.* at
23 668-69.) An ALJ may reject a claimant's symptom testimony when it is contradicted by

1 the medical evidence. *See Carmickle*, 533 F.3d at 1161 (citing *Johnson v. Shalala*, 60
2 F.3d 1428, 1434 (9th Cir.1995)). But the ALJ must explain how the medical evidence
3 contradicts the Plaintiff's testimony. *See Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
4 1993). ALJ Kennedy met this standard.

5 ALJ Kennedy focused on two features of the medical record. First, Plaintiff
6 regularly denied to her providers many of the symptoms she alleged in her testimony.
7 (AR at 668.) For example, Plaintiff alleged daily headaches with severe pain, blurred
8 vision, and vomiting. (*See id.* at 43, 55, 721.) But Plaintiff commonly denied these
9 symptoms to her doctors. (*See id.* at 525-26, 535-40, 558-64, 635-45, 1174-1220,
10 1230-49.) Furthermore, ALJ Kennedy noted that Plaintiff "did not miss, reschedule, or
11 cancel appointments at a frequency consistent with her allegations of daily, debilitating
12 migraine symptoms." (*Id.* at 669.)

14 Second, ALJ Kennedy noted that Plaintiff's presentation at examinations was
15 largely normal. (*Id.* at 298-307, 527, 537, 546, 646, 668-69, 1067-68, 1182-1202, 1232,
16 1240.) This finding rests on shakier ground as some of the records to which ALJ
17 Kennedy cited do not address headache symptoms, and others indicate some issues
18 associated with Plaintiff's neck, which was a potential cause of her headaches. (*See, e.g.,*
19 *id.* at 540, 632, 1061, 1082, 1098, 1103, 1228, 1236, 1245.) Nonetheless, ALJ Kennedy
20 was entitled to resolve ambiguities in the evidence, and Plaintiff has not shown that ALJ
21 Kennedy's interpretation here was unreasonable. *See Thomas*, 278 F.3d at 954.

23 ALJ Kennedy gave two other reasons for discounting Plaintiff's headache

1 symptom testimony, neither of which withstands scrutiny. First, ALJ Kennedy
2 discounted Plaintiff's headache symptom testimony because Plaintiff had only received
3 conservative treatment for her condition. (*See id.* at 669.) In reality, Plaintiff had been
4 prescribed multiple pain medications, including oxycodone, and eventually received
5 Botox injections. (*See id.* at 1064, 1068, 1077-1125.) Pain treatment with opioids is
6 generally not considered conservative treatment. *See Kager v. Astrue*, 256 F. App'x 919,
7 923 (9th Cir. 2007) (finding error where the ALJ discounted the plaintiff's testimony
8 based on a lack of significant pain therapy, when the plaintiff had been prescribed opioid
9 medications). ALJ Kennedy thus erred in rejecting Plaintiff's headache symptom
10 testimony on this basis.
11

12 Second, ALJ Kennedy discounted Plaintiff's headache symptom testimony
13 because he found it inconsistent with Plaintiff's ability to care for her children. (AR at
14 669.) ALJ Kennedy pointed to two records allegedly showing that Plaintiff cared for her
15 children (one of whom was a teenager), but neither record provides enough information
16 to contradict Plaintiff's allegations. (*See id.* at 525-26 (noting only that Plaintiff was two
17 months postpartum and spent time with her family), 1103 (noting only that Plaintiff spent
18 much of her time "at home with kids")). The court will not do the ALJ's job for him by
19 combing the record to look for conflicts supporting his determination. *See Burrell v.*
20 *Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) ("Our decisions make clear that we may not
21 take a general finding—an unspecified conflict between [the plaintiff's] testimony about
22 daily activities and her reports to doctors—and comb the administrative record to find
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1 specific conflicts.”).

2 Although ALJ Kennedy’s analysis of Plaintiff’s symptom testimony was not free
3 from error, Plaintiff has failed to show harmful error. *See Ludwig*, 681 F.3d at 1054
4 (citing *Shinseki*, 556 U.S. at 407-09). ALJ Kennedy’s determination that Plaintiff’s
5 symptom testimony was contradicted by the medical evidence survives regardless of ALJ
6 Kennedy’s errors, so those errors were “inconsequential to the ultimate disability
7 determination.” *Carmickle*, 533 F.3d at 1162. Those errors were thus harmless. *Id.*
8

9 2. The ALJ Did Not Harmfully Err in Discounting Plaintiff’s Testimony
10 Regarding the Severity of Her Other Pain Symptoms

11 Plaintiff testified that, in addition to her migraines, she had pain in her neck and
12 shoulders, and sciatica, primarily in the right leg. (AR at 715.) Plaintiff testified that
13 these symptoms remained the same from her onset date until her third car accident in
14 March 2015, at which time her symptoms worsened. (*Id.* at 723-24.) Plaintiff alleged
15 that she had difficulty sitting for extended periods of time because her legs or feet would
16 swell, and her sciatica would flare up. (*Id.* at 734.) She alleged that she needed to lean
17 up against something when standing in one position to avoid issues. (*Id.* at 734-35.)

18 ALJ Kennedy rejected this testimony as not entirely consistent with the medical
19 record. (*Id.* at 669.) He adopted and incorporated ALJ Alexis’s analysis—which Judge
20 Tsuchida upheld—regarding Plaintiff’s testimony from the 2014 hearing. (*Id.*) ALJ
21 Kennedy rejected Plaintiff’s new testimony as inconsistent with the overall medical
22 evidence, including her normal presentation on examination, and her receipt of
23 conservative treatment. (*Id.* at 669-70.)

1 ALJ Kennedy did not err in rejecting Plaintiff's testimony regarding her other pain
2 symptoms. As ALJ Kennedy noted, Plaintiff displayed normal range of motion in her
3 neck and upper extremities. (*See id.* at 669-70, 1198, 1202, 1232, 1245.) Plaintiff
4 showed no gait issues or abnormality in lower extremity function. (*Id.* at 670, 1064,
5 1067-68, 1082, 1092, 1103, 1111-12, 1198, 1202, 1232, 1245.) Plaintiff was prescribed
6 only basic treatment, although her receipt of opioid medication weakens reliance on this
7 as a reason to reject Plaintiff's other pain testimony. *See Kager*, 256 F. App'x at 923.
8 Nonetheless, the medical evidence to which ALJ Kennedy cited reasonably supported his
9 decision to reject Plaintiff's testimony regarding her other pain symptoms. *See*
10 *Carmickle*, 533 F.3d at 1161 (citing *Johnson*, 60 F.3d at 1434).

12 3. The ALJ Did Not Harmfully Err in Discounting Plaintiff's Testimony
13 Regarding the Severity of Her Mental Health Symptoms

14 Plaintiff did not testify to mental health symptoms at the 2018 hearing, other than
15 those tied to her migraine and pain symptoms. (*See AR* at 709-35.) ALJ Kennedy
16 correctly noted this, stating that Plaintiff "testified to limitations due to migraines and
17 musculoskeletal pain, but mentioned mental restrictions only briefly." (*Id.* at 670.) ALJ
18 Kennedy went on to reject any of Plaintiff's mentions of mental restrictions, noting that
19 Plaintiff did not receive any specialized mental health treatment, "made only episodic
20 complaints of mental symptoms, and typically denied such symptoms altogether," and
21 presented normally on clinical examination. (*Id.* at 670-71.) ALJ Kennedy also noted
22 that Plaintiff was able to drive a car, which he found to contradict Plaintiff's testimony.
23 (*Id.* at 671.)

1 Plaintiff has failed to show that ALJ Kennedy harmfully erred in rejecting
2 Plaintiff's testimony regarding her mental health symptoms. *See Ludwig*, 681 F.3d at
3 1054 (citing *Shinseki*, 556 U.S. at 407-09). As ALJ Kennedy noted, Plaintiff did not
4 testify to any specific mental health symptoms at the 2018 hearing. (*See* AR at 670,
5 709-35.) There was therefore nothing for ALJ Kennedy to account for in the RFC. This
6 alone makes any possible error harmless, as it had no effect on the ultimate outcome here.
7 *See Carmickle*, 533 F.3d at 1161 (citing *Johnson*, 60 F.3d at 1434).

8 **E. The ALJ Did Not Harmfully Err in Discounting the Lay Witness Statements**

9
10 Plaintiff argues that ALJ Kennedy erred in evaluating lay witness statements from
11 Mr. D. and Ms. Moore. (Pl. Op. Br. at 15-18.) Judge Tsuchida held that ALJ Alexis
12 erred in rejecting Mr. D.'s statement, but did not err in rejecting a 2014 statement from
13 Ms. Moore. (AR at 800-01.) Per the law of the case doctrine, the court will not revisit
14 evaluation of Ms. Moore's 2014 statement. *See Buck*, 869 F.3d at 1050. However, Ms.
15 Moore submitted a second statement in 2016, after Judge Tsuchida's decision, so the
16 court will address ALJ Kennedy's treatment of that statement.

17 1. The ALJ Did Not Harmfully Err in Rejecting Mr. D's Statement

18 Plaintiff argues that ALJ Kennedy erred in rejecting a written statement from Mr.
19 D. (Pl. Op. Br. at 15-17.) Mr. D. submitted a written statement, dated April 24, 2014,
20 reporting that Plaintiff had a litany of symptoms and limitations. (AR at 250-55.) ALJ
21 Alexis rejected Mr. D.'s statement because she found it inconsistent with the medical
22 evidence regarding Plaintiff's headaches, and inconsistent with the medical record
23

1 regarding Plaintiff's physical limitations. (*See id.* at 26.) Judge Tsuchida found that ALJ
2 Alexis erred because ALJ Alexis failed to adequately explain how the evidence to which
3 she cited was inconsistent with Mr. D.'s statements. (*See id.* at 801.)

4 ALJ Kennedy discounted Mr. D.'s statement because it "generally reflects the
5 same allegations made by [Plaintiff], allegations that are not entirely consistent with the
6 overall record for the reasons discussed at length above." (*Id.* at 672.) ALJ Kennedy
7 further explained that Mr. D.'s statements regarding the severity of Plaintiff's migraines,
8 as well as issues sitting and walking, were inconsistent with the objective medical
9 evidence, including conservative treatment. (*Id.*)

10
11 ALJ Kennedy did not harmfully err in rejecting Mr. D.'s statement. ALJ Kennedy
12 reasonably determined that Mr. D. did not describe any limitations beyond those Plaintiff
13 herself described. (*See id.* at 672.) ALJ Kennedy therefore justifiably rejected Mr. D.'s
14 statement for the same reasons he rejected Plaintiff's testimony. *See Molina*, 674 F.3d at
15 1122.

16 2. The ALJ Did Not Harmfully Err in Rejecting Ms. Moore's 2016 Statement

17 Plaintiff argues that ALJ Kennedy erred in rejecting a statement Ms. Moore
18 submitted in October 2016. (Pl. Op. Br. at 17-18.) In that 2016 statement, Ms. Moore
19 reported her observations of Plaintiff's symptoms and limitations. (AR at 981-88.)
20 Much like his treatment of Mr. D.'s statement, ALJ Kennedy found that Ms. Moore's
21 statements reflected the same allegations made by Plaintiff, and were not entirely
22 consistent with the record for the same reasons as Plaintiff's testimony. (*Id.* at 674-75.)
23

1 ALJ Kennedy did not harmfully err in rejecting Ms. Moore's statement. ALJ
2 Kennedy reasonably determined that Mr. D. did not describe any limitations beyond
3 those Plaintiff herself described. (*See id.*) ALJ Kennedy therefore justifiably rejected
4 Ms. Moore's statement for the same reasons he rejected Plaintiff's testimony. *See*
5 *Molina*, 674 F.3d at 1122.

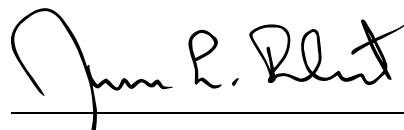
6 **F. The ALJ Did Not Err in Assessing Plaintiff's RFC**

7 Plaintiff argues that ALJ Kennedy erred in assessing Plaintiff's RFC, and erred by
8 based his step five findings on that RFC assessment. (Pl. Op. Br. at 18.) This argument
9 is derivative of Plaintiff's other arguments, as it is based on the contention that ALJ
10 Kennedy failed to properly evaluate Plaintiff's symptom testimony, the medical evidence,
11 and the lay witness testimony. (*See id.*) Because the court has found that ALJ Kennedy
12 did not err in his assessment of that evidence, Plaintiff's argument fails. *See*
13 *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008) (holding that an ALJ
14 has no obligation to include limitations in the RFC that are based on properly rejected
15 evidence).
16

17 **IV. CONCLUSION**

18 For the foregoing reasons, the Commissioner's final decision AFFIRMED and this
19 case is DISMISSED with prejudice.

20 DATED this 15th day of October, 2019.

21 
22

23 JAMES L. ROBART
United States District Judge